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IN THE
COURT OF APPEALS OF INDIANA

BRUCE BURKETT,

Appellant-Respondent,

vs.

GUS PULOS, D.D.S.,

Appellee-Petitioner,

and

AMY STRATI, Commissioner of the Indiana Department of Insurance,

Third Party Respondent.

No. 49A02-0511-CV-1047

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth Johnson, Judge
Cause No. 49D02-0502-MI-7094

November 14, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary[1]

Bruce Burkett appeals the trial court's grant of summary judgment in favor of Gus Pulos, D.D.S. We affirm.

Issues

Burkett presents three issues for review, which we consolidate, restate, and reorder as:

I. whether the statute of limitations in medical malpractice cases, as applied in this case, abridges the Privileges and Immunities Clause of the Indiana Constitution or the Equal Protection Clause of the United States Constitution; and

II. whether there exists an issue of fact related to Burkett's claim that Dr. Pulos fraudulently concealed the alleged malpractice.

Facts

Some time in the early or mid-1990's, Burkett began seeing Dr. Pulos for dental treatment. From that time until 2001, Dr. Pulos was Burkett's primary dentist and provided treatments such as fillings, bridges, and crowns. On July 18, 2001, Burkett had an appointment with Dr. Pulos during which Dr. Pulos advised Burkett that he was in need of further, extensive treatment.

On September 6, 2001, Burkett sought a second opinion from Dr. Stacy Rapp regarding Dr. Pulos's July 18 diagnosis and treatment plan. Dr. Rapp advised Burkett that he was in need of major dental work and indicated that the dental work Dr. Pulos

[1] We heard oral argument in this matter on September 25, 2006 in Indianapolis. We thank the parties for their apt presentations.

performed was deficient. Burkett further learned that his dental health was very poor—more so than Dr. Pulos had ever indicated to him.

On August 28, 2003, Burkett filed with the Indiana Department of Insurance a proposed complaint for malpractice against Dr. Pulos alleging that Burkett had "discovered that the dental work which had been performed for him by [Dr. Pulos] was deficient in several respects which deficiencies included a complete lack of occlusion on the right side, poor occlusion on the left, and considerable decay under a crown." Appellant's App. p. 7. On February 9, 2005, Dr. Pulos filed with the trial court a motion for summary judgment arguing that Burkett had failed to comply with the two-year statute of limitations applicable to medical malpractice actions. Burkett responded to Dr. Pulos's motion. The trial court held a summary judgment hearing on July 8, 2005 and granted Dr. Pulos's motion on August 29, 2005, concluding that Burkett's action was barred by the statute of limitations. Burkett appeals.

Analysis

We review the trial court's grant of summary judgment in favor of Dr. Pulos under the same standard as that applied by the trial court pursuant to Indiana Trial Rule 56(C). See McDonald v. Lattire, 844 N.E.2d 206, 210 (Ind. Ct. App. 2006). We must determine whether "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). Trial Rule 56(C) dictates that Dr. Pulos, the party seeking summary judgment, bears the burden of making a prima facie showing that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. See

McDonald, 844 N.E.2d at 210. Once Dr. Pulos satisfies this burden through his designated evidence, Burkett, the non-movant, was required to designate specific facts demonstrating the existence of a genuine issue for trial. See id. The court must accept as true those facts alleged by Burkett, construe the evidence in favor of Burkett, and resolve all doubts against Dr. Pulos. See id.

On appeal, we review the trial court's decision to ensure that the parties were not improperly denied their day in court. Coffman v. PSI Energy, Inc., 815 N.E.2d 522, 526 (Ind. Ct. App. 2004), trans. denied. "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue." Id.

I. Constitutional Validity

Burkett argues that the statute of limitations for medical malpractice actions violates the Fourteenth Amendment to the United States Constitution and Article I, Section 23 of the Indiana Constitution as applied to him, a plaintiff who discovered the alleged malpractice after the date of occurrence but prior to the expiration of the statute of limitations for medical malpractice actions ("delayed discovery plaintiff.")[2] Because some of the analysis necessary to address these contentions overlaps, we address them together.

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[2] Burkett does not attack the facial constitutionality of the statute, and our supreme court has concluded that the statute is constitutional on its face with respect to Article I, Section 23. See Martin v. Richey, 711, N.E.2d 1273, 1279 (Ind. 1999).

The statute of limitations for medical malpractice actions provides that "A claim . . . may not be brought against a health care provider . . . unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect . . . ." Ind. Code § 34-18-7-1(b). Our supreme court has construed this statute to be an "occurrence," rather than "discovery" statute, and, as such, an action for medical malpractice must generally be initiated within two years from the date of the alleged neglect rather than from the date it was discovered. See Martin v. Richey, 711 N.E.2d 1273, 1278 (Ind. 1999). An exception to this absolute two-year limit, however, was carved out in the companion cases Martin and Van Dusen v. Stotts, 712 N.E.2d 491 (Ind. 1999), in which the Indiana Supreme Court held that Indiana Code Section 34-18-7-1(b), as applied to the plaintiffs in those cases, violated Article I, Section 23—the Privileges and Immunities Clause—of the Indiana Constitution.

In Martin, the plaintiff visited her gynecologist's office on March 13, 1991, complaining of a lump and pain in one of her breasts. Martin, 711 N.E.2d at 1274. After a mammogram and needle biopsy, Dr. Richey informed Martin that no malignant tumor cells were identified in the biopsy specimen, but he failed to advise Martin to follow up with a general surgeon. Id. at 1276. In April of 1994, Martin was diagnosed with breast cancer and underwent a radical mastectomy and a course of chemotherapy that ended in September of 1994. Id. at 1277. On October 14, 1994, Martin filed her complaint against Dr. Richey. Id. The trial court granted summary judgment in favor of Dr. Richey, stating that Martin's action was barred by the two-year statute of limitations. Id. Our supreme court held otherwise, stating, "[P]laintiff cannot be foreclosed from

bringing her malpractice suit when, unlike many other medical malpractice plaintiffs, she could not reasonably be expected to discover the asserted malpractice and resulting injury within the two-year period given the nature of the asserted malpractice and of her medical condition." Id. at 1282.

Van Dusen presented a similar set of facts in which the plaintiff learned after the expiration of the statute of limitations that a biopsy had been misread over two years earlier and that he suffered from prostate cancer. Van Dusen, 712 N.E.2d at 494. In Van Dusen, the court elaborated on its holding in Martin, stating:

> We construe section 34-18-7-1(b) to permit plaintiffs like Martin and the Stottses—that is, plaintiffs who, because they suffer from cancer or other similar diseases or medical conditions with long latency periods and are unable to discover the malpractice and their resulting injury within the two-year statutory period—to file their claims within two years of the date when they discover the malpractice and the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury.

Id. at 497.

The Martin and Van Dusen courts reached their holdings by applying the test for Article I, Section 23 constitutionality enunciated in Collins v. Day, 644 N.E.2d 72 (Ind. 1994). The first portion of the Collins analysis provides: "the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes." Collins, 644 N.E.2d at 80.

The analysis required under the first prong of the Collins test is very similar to the rational basis test, which inquires into a statute's viability under the Equal Protection

Clause of the United States Constitution. Burkett concedes that Indiana Code Section 34-18-7-1(b) neither implicates a fundamental right nor affects a suspect class and that no elevated level of scrutiny is necessary. The rational basis test requires courts to assess whether the law under challenge is "rationally related to a legitimate governmental purpose." Indiana High School Athletic Ass'n, Inc. v. Carlberg by Carlberg, 694 N.E.2d 222, 236 (Ind. 1997).

The legislature enacted Indiana Code Section 34-18-7-1(b) as a part of the Medical Malpractice Act of 1975. Harris v. Raymond, 715 N.E.2d 388, 392 (Ind. 1999). In an attempt to assist healthcare providers in obtaining affordable malpractice insurance, the Medical Malpractice Act's goal was to limit providers' financial exposure, thereby allowing them to acquire affordable malpractice insurance. McCarty v. Sanders, 805 N.E.2d 894, 899 (Ind. Ct. App. 2004), trans. denied. "The statutory scheme 'attempts to balance the escalating costs of malpractice insurance with the realization that some incidents of malpractice produce devastating results, including astronomical medical bills.'" Id. (citation omitted). Our supreme court has, in several cases, already determined that the classifications created by the medical malpractice statute are reasonably related to the legislature's goals for the act. We are precedent-bound to hold likewise.

The Martin court observed that our supreme court has already concluded that there exists a reasonable relationship between the legislative goals of the Medical Malpractice Act and "a classification scheme which distinguishes between victims of medical malpractice and victims of other torts . . . ." Martin, 711 N.E.2d at 1281. The time

restraints provided by the statute of limitations help limit insurers' unfair exposure to defending healthcare providers that stems from dimmed memories or the loss of evidence over time. Id. The court reiterated this statement in Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692 (Ind. 2000), stating, "a classification scheme resulting in different treatment for medical malpractice plaintiffs as compared to other tort victims satisfies the first prong of Collins." Id. at 696.

More recently, in Ledbetter v. Hunter, 842 N.E.2d 810 (Ind. 2006), our supreme court addressed the constitutionality of the Medical Malpractice Act's statute of limitations governing minors' claims. The court held that Indiana Code Section 34-18-7-1(b), which requires a minor to initiate an action within two years from the date of malpractice or before his or her eighth birthday if the malpractice occurred before the child was six years old, did not abridge the plaintiff's constitutional rights as protected by Article I, Section 23 of the Indiana Constitution. Ledbetter, 842 N.E.2d at 812-13. The Ledbetter court emphasized that courts may not substitute their judgment for that of the legislature and that courts owe the legislature great deference. See id. at 813. Further, "a challenger 'must negative every conceivable basis which might have supported the classification.'" Id. (citations omitted).

In Martin, Boggs, and Ledbetter, our supreme court generally defined the classes created by the Medical Malpractice Act as medical malpractice plaintiffs and tort plaintiffs not asserting medical malpractice claims. All three courts held that the goals of the Medical Malpractice Act were furthered by the creation of the challenged classes. Martin, 711 N.E.2d at 1281 ("[T]his Court has held that a classification scheme which

distinguishes between victims of medical malpractice and victims of other torts . . . is reasonably related to the goal of controlling malpractice costs . . . and . . . limiting unfair exposure to defending health care providers that stems from dimmed memories or the loss of evidence over time."); Boggs, 730 N.E.2d at 696 ("[A] classification scheme resulting in different treatment for medical malpractice plaintiffs as compared to other tort victims satisfies the first prong of Collins."); Ledbetter, 842 N.E.2d at 813-14 (stating that the purpose of the Medical Malpractice Act was advanced in a rational manner "by limiting . . . the classification of those entitled to legal disability by age and type of claim . . . ."). Burkett attempts to distinguish his case from Martin, Boggs, and Ledbetter by noting that he has defined the classes at issue differently than they were defined in those cases and by arguing that the first prong of the Collins test is not satisfied as to his classification.

Burkett seems to define the two classifications at issue here as 1) delayed discovery plaintiffs and 2) all other medical malpractice plaintiffs, as opposed to tort plaintiffs in general. Appellant's Br. p. 16 n.5 ("Here the class at issue is that sub-set of malpractice victims who discover their claims after, but within two years of, the occurrence."). Burkett argues that the creation of these classes does not advance the legislature's goals for the Medical Malpractice Act but, instead, works against those goals by encouraging plaintiffs "to file what might otherwise be deemed ill-advised claims." Id. at 16. Burkett further argues that claims filed two years after a delayed discovery plaintiff learns of the alleged malpractice would be no more stale than those filed by a plaintiff who, like Martin or Van Dusen, is unable to discover the malpractice until well

after the expiration of the limitations period. Burkett cites to no authority in support of these two contentions.

Finally, Burkett argues that limiting the time period during which plaintiffs like himself are able to initiate medical malpractice actions does not help lower the costs of health care. In support of this general proposition, Burkett cites a case from the Utah Supreme Court, Lee v. Gaufin, 867 P.2d 572 (Utah 1993). He reasons:

> [W]hen considered logically, there is no benefit to the cost of healthcare in not applying the discovery rule to the present class of victims. This is because present jurisprudence supposedly affords all medical malpractice victims a "reasonable opportunity" to bring their claims. This means that malpractice insurers and health care providers must assume that every victim of malpractice will have an opportunity to and actually will bring a claim upon discovery of the malpractice when calculating prices, no matter when that discovery may be. As a result, the cost of health care would be unaffected by doing away with the arbitrary time limit of two years from the occurrence as to this class . . . .

Id.

Dr. Pulos does not address the difference between Burkett's characterization of the classes and Martin, Boggs, and Ledbetter's characterization of the classes. With regard to Burkett's Fourteenth Amendment argument, however, Dr. Pulos urges us to rely on our holding in Cundiff v. Daviess County Hosp., 656 N.E.2d 298 (Ind. Ct. App. 1995), trans. denied. Relying on opinions by the Indiana Supreme Court in Johnson v. St. Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980), and Rohrabaugh v. Wagoner, 274 Ind. 661, 413 N.E.2d 819 (1980), the Cundiff court held that Indiana Code Section 34-18-7-1(b)

did not violate a minor plaintiff's Fourteenth Amendment rights. Dr. Pulos asks us to reach the same conclusion here.

Dr. Pulos further argues that the Indiana Supreme Court has consistently refused to reconsider the legitimacy of the legislature's goals for the Medical Malpractice Act as they relate to the classifications that several plaintiffs have challenged since the time that act was passed. Indeed, the court has, under a variety of fact scenarios, held that the classifications created by the Medical Malpractice Act's statute of limitations are reasonably related to the goals for the Act. See Martin, 711 N.E.2d at 1281.

Given the deference we must afford the legislature, coupled with our supreme court's long-held view that the Medical Malpractice Act's goals are indeed advanced by the classes the statute of limitations creates, we do not and cannot hold differently in this case. In reaching this conclusion, we further take counsel from the principle of legislative acquiescence. "[I]t is well-established that a judicial interpretation of a statute, particularly by the Indiana Supreme Court, accompanied by substantial legislative inaction for a considerable time, may be understood to signify the General Assembly's acquiescence and agreement with the judicial interpretation." Fraley v. Minger, 829 N.E.2d 476, 492 (Ind. 2005).

When faced with challenges to Indiana Code Section 34-18-7-1(b), our supreme court has consistently concluded that the statute fosters the legislative goals of the Medical Malpractice Act. This has been the case at least since Johnson was decided in 1980, and the General Assembly has not subsequently amended the statute in a way that would suggest disagreement with our supreme court's holdings. The significance of the

legislature's inaction is not lost on us; had the legislature desired a different result than that reached by the Indiana Supreme Court in previous challenges to the statute, it would have amended the statute to reach that result.

The second level of analysis articulated by Collins requires that the preferential treatment at issue must be uniformly applicable and equally available to all persons similarly situated. Ledbetter, 842 N.E.2d at 812. It is on these grounds that the Richey and Van Dusen courts found Indiana Code Section 34-18-7-1(b) to violate the Indiana Constitution's Privileges and Immunities Clause as applied to the plaintiffs in those cases.

Burkett argues that the classifications he identifies fail the second prong of the Collins test because some plaintiffs will have "almost the full two years to bring a claim, while others will have much less opportunity." Appellant's Br. pp. 16-17. Burkett's argument is accurate; pursuant to this occurrence statute, delayed discovery plaintiffs will have varying amounts of time in which they must file their medical malpractice actions before they are barred. However, in Boggs our supreme court affirmed the constitutionality of Indiana Code Section 34-18-7-1(b) with respect to Burkett's class of plaintiffs, and Dr. Pulos asserts in his appellate brief that case is "on all fours with the facts in the instant case." Appellee's Br. p. 16. Burkett disagrees and, again, differentiates his case on based on his identification of the classes at issue. We agree with Dr. Pulos and conclude that there is no meaningful difference between the classifications identified in Boggs and those identified by Burkett.

Carolyn Boggs sought medical attention in July of 1991 after finding a mass in one of her breasts. Carolyn's doctor took a mammogram, which was read by Tri-State Radiology, and instructed her to return for a follow-up mammogram in one year. Boggs, 730 N.E.2d at 695. On July 28, 1992, Carolyn's doctor took a second mammogram, which again was interpreted by Tri-State Radiology. Id. Following the second mammogram, Carolyn's doctor performed a biopsy, the results of which indicated that the mass in Carolyn's breast was malignant. Id. Further tests revealed that the cancer had metastasized to her liver and that Carolyn's breast cancer was in Stage IV. Id. Carolyn died on July 28, 1993. On July 1, 1994, her husband initiated a medical malpractice action. Id. After the trial court granted summary judgment in favor of Carolyn's healthcare providers, Boggs appealed, arguing that the medical malpractice statute of limitations violated the Privileges and Immunities Clause and was unconstitutional as applied to his case. Id. at 695.

The precise issue addressed in Boggs was "whether the statute of limitations is unconstitutional as applied to plaintiffs who cannot reasonably be expected to learn of their injuries at the time of the alleged occurrence of malpractice, but do, or should, become aware of their injuries well before the end of the limitations period." Id. at 696. Citing Martin, the Boggs court held that the first prong of Collins was satisfied. Id. The court then concluded that, per the second Collins prong, "the classes defined by discovery of the claims at different times in relation to the alleged occurrence of malpractice pass constitutional muster." Id. at 697.

The Boggs court acknowledged that, under an occurrence-based statute of limitations, medical malpractice plaintiffs often will have differing amounts of time within which they must file their claims because plaintiffs "may or may not be immediately aware of an injury from an act of malpractice and also may or may not be aware that the injury was attributable to an act or omission by a health care provider." Id. The court further explained that "All statutes of limitations are to some degree arbitrary," and concluded the differences in the amounts of time plaintiffs have to file complaints enough to create impermissible classifications under Article I, Section 23 "would render every statute of limitations or repose a discovery-based statute as a matter of constitutional law. This would significantly undermine the fundamental objective of limitations periods . . . ." Id.

The court recognized the necessity of the Martin court's holding in order to ensure that a plaintiff who is unable to discover the alleged malpractice after the expiration of the limitations period is not barred from bringing a claim. But in Boggs, the court was not faced with:

> the practical impossibility of asserting the claim. Rather, Boggs or Carolyn could have brought a claim within the statutory period. . . . The relatively minor burden of requiring a claimant to act within the same time period from the date of occurrence, but with less time to decide to sue, is far less severe than barring the claim altogether.

Id. The court recognized that, although Boggs was similarly situated to Martin and Van Dusen because the alleged malpractice could not have been discovered when it occurred, the situation presented in Boggs was very different because, "Boggs or Carolyn had an

11-month window to file a medical malpractice claim after knowledge of the injury, yet did not." Id.

The Boggs court held:

> as long as the statute of limitations does not shorten this window of time so unreasonably that it is impractical for a plaintiff to file a claim at all, as it did in Martin and Van Dusen, it is constitutional as applied to that plaintiff. The statute reflects a legislative judgment to define the class who may proceed as those who discover their claim in time to file within two years after the occurrence. That judgment is entitled to deference, and permits all within the class, including Boggs, to bring their case to court, if they choose to do so, within the statutory period. . . . There may be situations where, like Martin and Van Dusen, discovering and presenting the claim within the time demanded by the statute is not reasonably possible. If so, the statute as applied under those circumstances may run afoul of the Indiana Constitution. But Boggs is not in that category. In the future, this Court may be presented with facts that support a claim such as the hypothetical eve of midnight discovery . . . . For the moment, however, it remains a hypothetical. Indeed, the problem of a last minute discovery is inherent in any statute of limitations . . . . It can best be addressed on a case-by-case basis, and, at least in this state, has apparently never arisen.

Id. at 697-98.

In this case, Dr. Pulos last treated Burkett on July 18, 2001. The parties do not dispute that this is the latest date on which the alleged malpractice occurred. As such, Burkett should have filed his complaint on or before July 18, 2003. Burkett sought a second opinion on September 6, 2001. Assuming that Dr. Pulos fraudulently concealed his alleged malpractice, Burkett argues that he did not discover that malpractice until September 6, 2001. Burkett then had slightly longer than 22 months—the time between his second opinion on September 6, 2001 and the expiration of the occurrence statute on

July 18, 2003—to file his complaint. He did not do so, however, until August 28, 2003. Burkett's case does not ask this court to address "the hypothetical eve of midnight discovery." Id. at 698. As such, we conclude that the Indiana Supreme Court's analysis and rationale in Boggs is on point here. The 22-month window Burkett had to file his claim is reasonable in light of Boggs. The statute of limitations for medical malpractice claims, as applied to Burkett here, violates neither the United States nor Indiana Constitution.

II. Fraudulent Concealment

In addition to his constitutional arguments, Burkett contends that Dr. Pulos fraudulently concealed his alleged malpractice, resulting in a tolling of the statute of limitations. Burkett argues that his complaint was timely filed and that Dr. Pulos is not entitled to judgment as a matter of law. He further contends that there are material issues of fact that make summary judgment inappropriate. We are not persuaded.

Burkett specifically argues that there exists an issue of fact as to whether Dr. Pulos fraudulently concealed the alleged malpractice because Dr. Pulos knew or should have known about the severity of Burkett's condition and advised him accordingly. Under the doctrine of fraudulent concealment, "a person is estopped from asserting the statute of limitations as a defense if that person, by deception or violation of a duty, has concealed material facts from the plaintiff and thereby prevented discovery of a wrong." Boggs, 730 N.E.2d at 698. Based on his fraudulent concealment argument, Burkett contends that Dr. Pulos is estopped from raising a statute of limitations defense because the limitations period was tolled as a result of Dr. Pulos's alleged fraudulent concealment.

> If the concealment is active, it is tolled until the patient discovers the malpractice, or in the exercise of due diligence should discover it. If the concealment is constructive . . . the statute of limitations is tolled until the termination of the physician-patient relationship, or, as in the active concealment case, until discovery, whichever is earlier. Constructive concealment consists of the failure to disclose material information to the patient. Active concealment involves affirmative acts of concealment intended to mislead or hinder the plaintiff from obtaining information concerning the malpractice. Under either strand of the doctrine, the patient must bring his or her claim within a reasonable period of time after the statute of limitations begins to run.

Coffer v. Arndt, 732 N.E.2d 815, 821 (Ind. Ct. App. 2000) (citations omitted), trans. denied.

We again note that Dr. Pulos bears the burden of making a prima facie showing that there are no genuine issues of material fact and he is entitled to judgment as a matter of law. See McDonald, 844 N.E.2d at 210. Burkett must subsequently designate facts demonstrating that a genuine issue for trial does exist. See id. We must accept as true the facts alleged by Burkett and construe the evidence in his favor. See id. We must also resolve all doubts against Dr. Pulos. See id.

Applying this standard, we conclude that Dr. Pulos has established Burkett's complaint was not timely filed and that Burkett has not adequately shown there exist any issues of material fact related to fraudulent concealment. Dr. Pulos was not barred from asserting a statute of limitations defense and is entitled to judgment as a matter of law. Because we reach these conclusions, we need not determine how long the statute of limitations would have been tolled had there been acts of fraudulent concealment by Dr. Pulos.

Dr. Pulos's designated evidence clearly illustrates, and Burkett does not contest, that the alleged malpractice occurred on July 18, 2001 and that Burkett's complaint was filed on August 28, 2003. Burkett's designated evidence, which he filed in support of his assertion that Dr. Pulos fraudulently concealed his alleged malpractice, includes Burkett's affidavit, portions of the transcript from Burkett's deposition, Burkett's current dentist's affidavit, and Dr. Pulos's medical records. In general, Burkett's designated evidence illustrates the nature of his dental maladies and the circumstances under which he fully learned about those maladies, the treatment he underwent, and other dentists' opinions regarding the quality of care Dr. Pulos provided Burkett.

More notably, however, Burkett's affidavit provides, in part:

> [T]he date of my last treatment with Dr. Pulos was July 18, 2001. At that visit, he informed me of certain problems with my mouth and of the procedures that would be needed to correct them. These problems were related to previous work that Dr. Pulos had performed . . . at that time I began to have questions as to the necessity of having procedures repeated. I decided [sic] time to seek a second opinion.

Appellant's App. pp. 30-31. Similarly, the designated portions of Burkett's deposition testimony provide:

> Q. Do you recall why you ceased treating with Doctor Pulos on July 18th, 2001?
>
> A. Yes. It was for basically numerous things. But part of it was the constant redoing of things, re-cementing crowns that -- you know. And then the bridge, you know, not being -- fitting correctly and stuff . . . .
>
> * * * * *

Q. Do you recall that [Dr. Pulos] had identified a problem with your Tooth Number 6, that it was decayed and that there was a loose bridge?

A. Yes. You know, I do think that that's probably what it was, and that was another reason why, you know, I decided that I was going to see another dentist.

Q. Do you recall him telling you that you may need a root canal and to re-cement the bridge as a temporary fix?

A. Yes, I think so.

Q. But that you would also need a future replacement of the bridge, do you recall that?

A. Right.

Id. at 58-59.

We do not believe that Burkett's designated evidence demonstrates an issue of fact related to his fraudulent concealment claim. Instead, the portions of Burkett's affidavit and deposition that we have reproduced here illustrate that Dr. Pulos recognized and communicated to Burkett on July 18, 2001 that there were problems with the dental work Dr. Pulos had previously performed and that those problems needed to be fixed. Burkett's evidence clearly indicates that he was cognizant at that time that he needed extensive treatment to remedy problems related to earlier treatment and that this knowledge compelled him to seek out further information from Dr. Rapp on September 6, 2001.

Given Burkett's level of knowledge and the fact that he was able to make inquires into his condition based on that knowledge, we cannot see how a fact finder could reasonably conclude either that Dr. Pulos failed to disclose material information or

affirmatively acted with the intention of misleading or hindering Burkett from obtaining information concerning the malpractice. In other words, Burkett has not shown that there exist fraudulent concealment-related issues of material fact suitable for a trial. Because Burkett has failed in this regard, Dr. Pulos is not precluded from raising a statute of limitations defense, which we have concluded that he accomplished through the evidence designated in conjunction with his motion for summary judgment. Having successfully asserted this defense, Dr. Pulos is entitled to judgment as a matter of law. The trial court did not abuse its discretion by granting summary judgment in favor of Dr. Pulos.

Conclusion

The classifications of plaintiffs created by the Medical Malpractice Act's statute of limitations advance a legitimate legislative goal. Burkett had a reasonable amount of time in which to file his complaint before the expiration of the two-year occurrence statute of limitations. Indiana Code Section 34-18-7-1(b) is not unconstitutional as applied to Burkett.

Burkett has not shown that there is an issue of material fact related to whether Dr. Pulos fraudulently concealed his alleged malpractice. Dr. Pulos was not precluded from raising a statute of limitations defense, and because he successfully did so, is entitled to judgment as a matter of law. The trial court properly granted summary judgment in favor of Dr. Pulos. We affirm.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.